

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND**

**Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6660**

PETITION OF SHANTI AND SONA VAIDYA *
for a special exception for a child day care *
facility (a group day care home) for up to *
12 children on property located at 9201 *
Bardon Road, Bethesda, Maryland *

***** *

Shanti Vaidya *

In Support of the Petition *

David C. Gardner, Esquire *
Attorney for Petitioners *

***** *

Martin Klauber, People's Counsel *

In Support of the Petition *

***** *

Special Exception No. 08-1

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION

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I. STATEMENT OF THE CASE

Petition S.E. 08-1, filed on October 2, 2007, requests a special exception in the R-60 Zone to operate a “group day care home”¹ for up to 12 children in an existing single-family, detached home at 9201 Bardon Road, Bethesda, Maryland. Petitioners, who are husband and wife, have been operating a licensed child care business (*i.e.*, a “family day care home”) in their home for up to 8 children since 2002 (Exhibit 12). A family day care home is a permitted use in the R-60 Zone, but increasing the number of children from 8 to 12 would transform the facility into a “group day care home” under Zoning Ordinance §59-A-2.1, and a special exception is required to operate a group day care home in the R-60 Zone. The day care facility is called “La Pappillon Day Care.”²

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On October 8, 2007, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on February 22, 2008, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 17).

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) reviewed the petition and, in a report dated January 28, 2008, recommended approval with conditions (Exhibit 22).³ At its regular meeting on February 14, 2008, the Planning Board voted

¹ A “group day care home” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “child day care centers” for 13 or more children. A “group day care home” is defined in §59-A-2.1 as:

A dwelling in which child day care services are provided:

- a. in the home where the licensee is the provider and is a resident;
- b. for 9 but not more than 12 children including the children of the provider, and;
- c. where staffing complies with state and local regulations, but no more than 3 non- resident staff members are on site at any time.

² “La Pappillon” appears to be a misspelling of the French word for butterfly, but that is the spelling used in the proposed sign shown on the Site, Landscape and Lighting Plan (Exhibit 4).

³ The Technical Staff report is frequently quoted and paraphrased herein.

unanimously to recommend approval, after modifying two of the conditions recommended by Technical Staff (Exhibit 26).⁴ Letters of support were received from four current and potential users of Petitioner's child care facility (Exhibits 21(b) and 27(a), (b) and (c)). The Overlook Homeowners Association sent an e-mail indicating that it "will not contest this application." Exhibit 24.

The hearing was convened, as scheduled on February 22, 2008, and testimony was presented in support of the petition by Petitioner Shanti Vaidya, who was represented at the hearing by attorney David Gardner, Esquire. Petitioners also submitted an Affidavit of Posting (Exhibit 29) and a e-mail from Joseph Pospisil of the Department of Public Works and Transportation (DPWT) regarding Parking Regulations (Exhibit 28).⁵ The People's Counsel, Martin Klauber, Esquire was unable to attend, but with the consent of Petitioners, he was permitted to file a comment after the hearing, based on a review of the transcript. He did so on February 28, 2008. Exhibit 31. The record was held open until March 7, 2008, to receive the People's Counsel's comments and to permit the Petitioners to submit affidavits of compliance with State and County requirements, which they did on February 28, 2008 for Shanti (Exhibit 32(a)) and on March 7, 2008 for Sona (Exhibit 33(a)). The record closed, as scheduled, on March 7, 2008.

There is no opposition in this case, and the special exception is supported by the evidence in the record. The Hearing Examiner will therefore grant the petition.

II. FACTUAL BACKGROUND

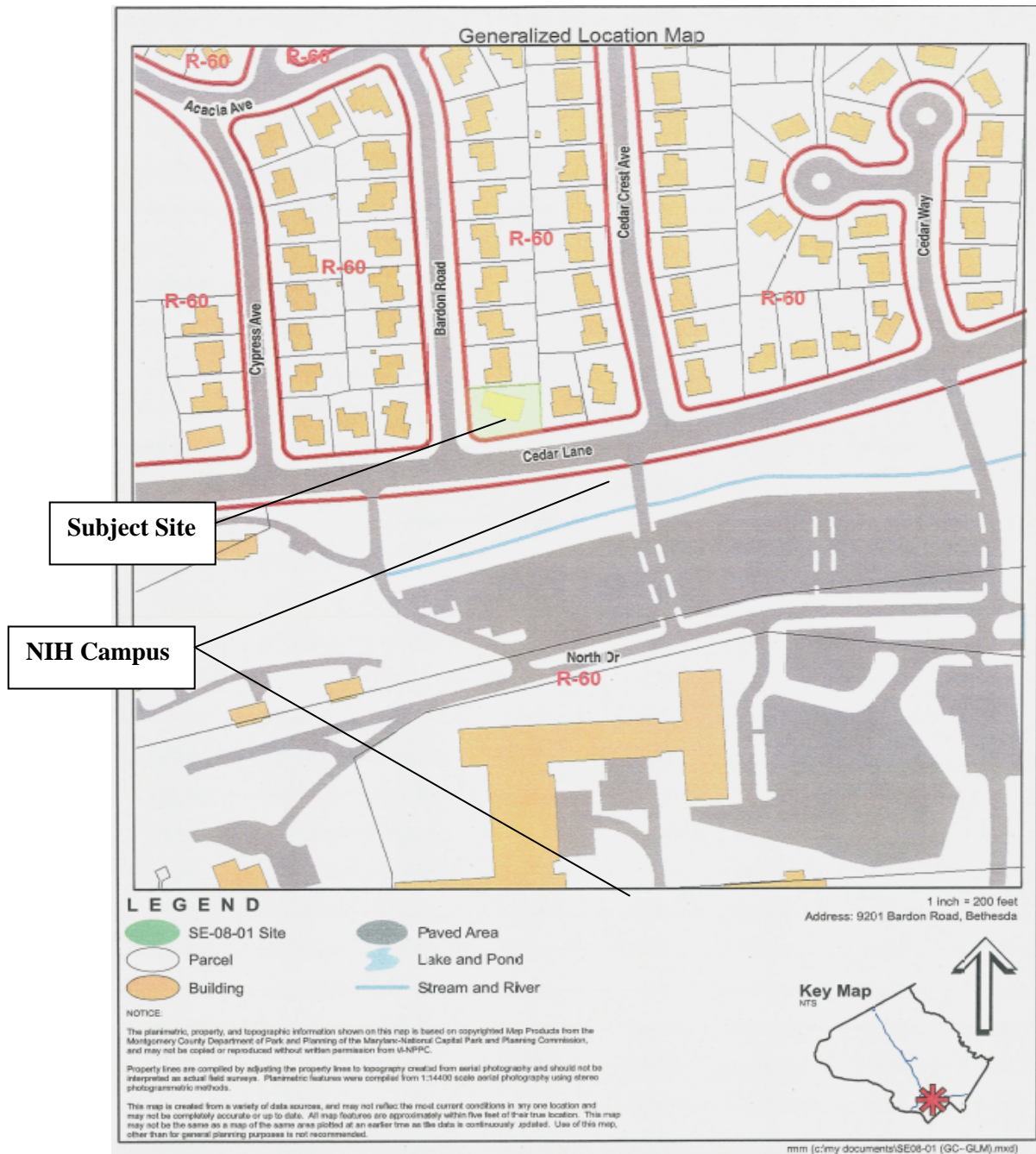
A. Subject Property and Surrounding Neighborhood

The proposed group day care home would operate in an existing, single-family, detached, two-story home, at 9201 Bardon Road, Bethesda, Maryland. It is located on the northeast corner of

⁴ The two changes were the removal of an age restriction in Condition Numbered 2, and changing the wording in Condition Numbered 6 from a requirement that at least 50% of the children be from employees of the National Institute of Health to one which requires that "[t]he child care facility shall produce no more than 3 additional trips."

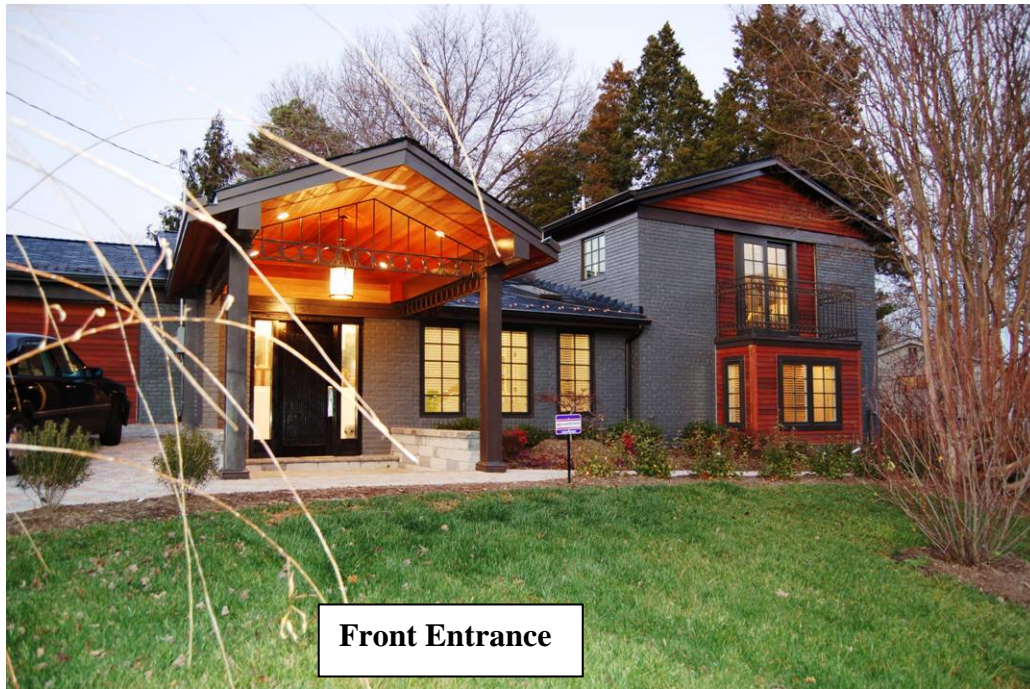
⁵ This e-mail was supplemented after the hearing, while the record was still open (Exhibit 30).

the intersection of West Cedar Lane and Bardon Road. The property's legal description is Lot 10, Block B in the Wisconsin Estates subdivision,⁶ and its location, across Cedar Lane from the National Institutes of Health (NIH), can be seen on the following Location Map appended to the Technical Staff report (Exhibit 22) as Attachment 1:

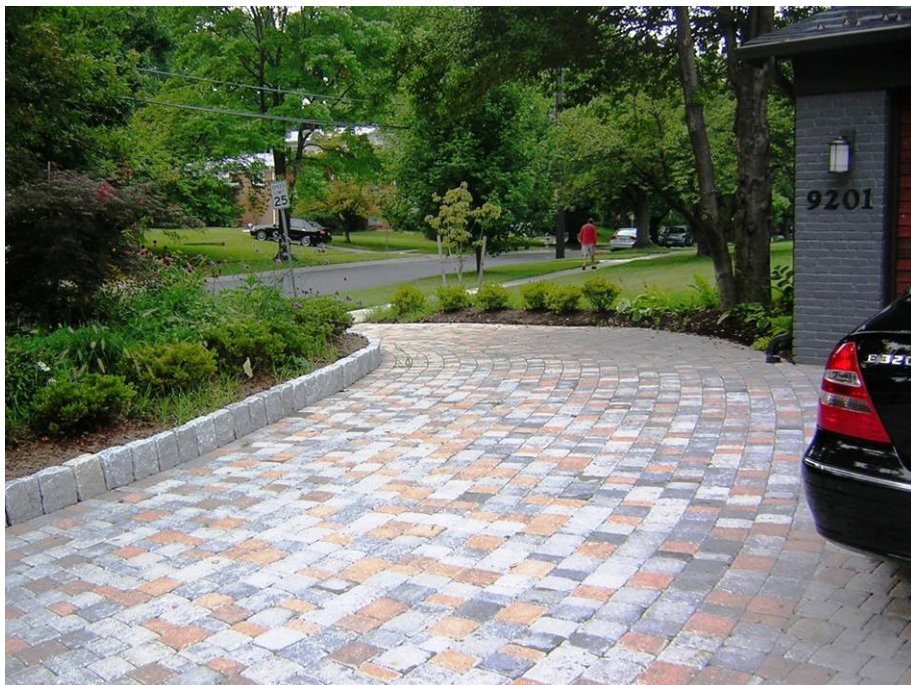


⁶ The Survey Plat (Exhibit 3) refers to the subdivision as "Wisconsin Estates." The area is also known as "Maplewood."

According to Technical Staff, the property contains 10,704 square feet of land, has approximately 72 feet of street frontage along Bardon Road and approximately 99 feet of frontage along West Cedar Lane. The dwelling, which was constructed in 1957, is set back 25 feet from Bardon Road. Staff also reports that it has a right side yard of approximately 26 feet, a left side yard of 8 feet and a rear yard of 20 feet. The home is depicted below in photographs (Exs. 14(a) and (c)):



As can be seen from the above photo, there is space on Bardon Road, directly in front of the home, which can accommodate two cars. One can also see from the above photo that the property is accessed via a brick-paved circular driveway from Bardon Road. Technical Staff indicates that the circular driveway has a diameter of approximately 64 feet and measures approximately 12 feet in width. There is also a one-car garage attached to the dwelling. These features are depicted more clearly in the following photographs (Exhibits 14(b) and (d)):

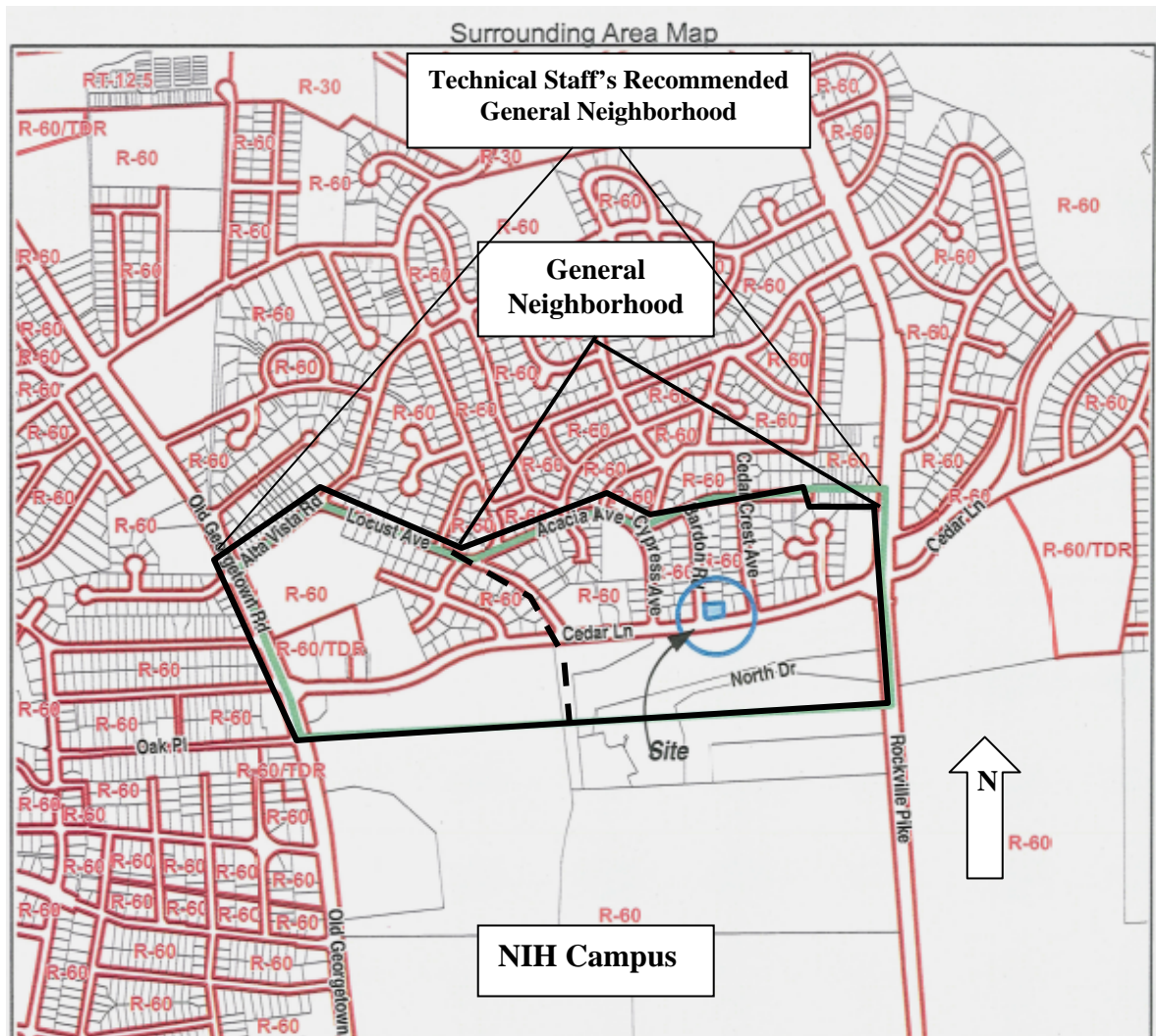


Technical Staff describes the property as relatively flat and landscaped with mature trees, shrubs and flowers. The rear yard of the property is fenced and contains an existing swing set and play area for use by the children. The existing wooden privacy fence will be maintained throughout the operation of the business. The back yard play area is shown below in Exhibit 14(g):



Single-family dwellings are present on both sides of Bardon Road. The NIH campus is directly across West Cedar Lane from the subject site. Technical Staff recommended defining the general neighborhood surrounding the subject property as bordered by Acacia Avenue, Locust Avenue and Alta Vista Road to the north, Rockville Pike to the east, Old Georgetown Road to the west and the National Institute of Health to the south. The neighborhood is zoned R-60 for single-family residences, and it is depicted on the following page in a Surrounding Area Map appended to

the Technical Staff report as Attachment 2. The Hearing Examiner finds that Technical Staff's definition of the General Neighborhood extends too far to the west, considering the small zoning impact of a special exception which will not require any external changes and which will produce little traffic. The Hearing Examiner's defined neighborhood has Locust Avenue as the western boundary, as shown in the Map below with a dashed line.



Technical Staff did not report any other special exceptions in the neighborhood, but a number are noted on the Zoning Map (Exhibit 5). According to Board of Appeals records, of which the Hearing Examiner takes official notice, these include a medical clinic and nursing home (BA 1518, 2630 and 2823), two optometrist's offices (BA 2079 and 2153) and a philanthropic institution (BA

2640). These are all located along Cedar Lane, which is a major connecting roadway between Old Georgetown Road and Rockville Pike.⁷

B. The Proposed Use, Landscaping, Lighting, Signage and the Environment

Petitioners propose to expand the existing “family day care home” for up to 8 children into a “group day care home” for up to 12 children generally ranging in age from infant to two and a half years, but may be up to five years of age (*i.e.*, pre-school). Tr. 73-74. The daycare will be located on the first floor of the existing home, as depicted in the Daycare Floor Plan (Exhibit 10):



As shown, there are three rooms (total floor area of 821 square feet) that are used for the activities and play area for the children. Technical Staff notes that the combined square footage of the three rooms exceeds the minimum requirement of 420 square feet for twelve children (Exhibit 22,

⁷ Other ostensible special exceptions listed on the zoning map were either denied by the Board of Appeals (*e.g.*, BA 2670, 2669 and 2031) or were actually variance requests, not special exceptions (*e.g.*, BAA 2867 and BAA 2286).

p. 3).⁸ The daycare rooms are labeled on the above daycare floor plan and are depicted in the following photographs (Exhibits 14(h), (i) and (j)). None of the daycare business will be conducted on the second floor of the dwelling.



⁸ This figure is based on the State requirement, in COMAR 13A.14.02.17C, that a child care center licensed after December 1, 1971, must provide a minimum of 35 square feet of floor space for each child (12 X 35 = 420).

One of the Petitioners, Sona Vaidya, currently possesses a license to operate a childcare facility for up to eight children (Exhibit 12). She will amend her license to permit her to provide services for up to twelve children following the granting of this special exception application. Exhibit 7. The other Petitioner, Shanti Vaidya, will participate as a resident staff member. As required under Code § 59-G-2.13.1(a)(4), the Petitioners have submitted affidavits affirming that they will comply with all applicable State and County requirements (Exhibits 32(a) and 33(a)). There will also be two non-resident employees, who will begin working at the site when the special exception is granted and a license is issued to increase the number of children from 8 to 12. The non-resident employees will work from 7:30 a.m. to 5:30 p.m.

The hours of operation will be between 7:30 a.m. and 5:30 p.m., Monday through Friday. Child care will not be provided on weekends or overnight at any time. Pick-up and drop-offs will occur on the circular driveway in front of the home, which, according to Technical Staff, provides adequate room for stacking of vehicles during morning drop-off and afternoon pick-ups. Petitioners will stagger arrival times for children between 7:30 a.m. and 9:30 a.m. during the morning drop-off and between 4:30 p.m. and 5:30 p.m. during the afternoon pick-up. The entrance for the daycare is on the east side (*i.e.*, rear) of the home, as shown in the floor plan reproduced on page of this Opinion.⁹ Tr. 32-34. Children will be walked by an adult from the drop-off point directly to the rear entrance door. Tr. 52-53.

As stated in Petitioners' Statement of Operations (Exhibit 7):

All of the activities associated with the business will be conducted within the home or in the back yard, which is enclosed by a six foot wooden privacy fence. The rear yard has an existing swing set which will be used by the children, and at no time will they be left outside without a child care provider. The existing wooden privacy fence will be maintained throughout the operation of the business.

⁹ Technical Staff stated that the front entrance to the home would be used. That is currently the case, but will not be once this special exception is approved. Tr. 32-34.

A photograph of the backyard and swing set (Exhibit 14(g)) is reproduced on page 7 of this Opinion.

Petitioners also note, in their Summary of Proof (Exhibit 8, p. 4):

The only outside activity associated with the center will be children playing in the rear yard. However, almost all of the children will be under the age of two, which means their outdoor activity will be minimal, and will always be accompanied by an adult when they are outside. The rear yard is large enough to easily accommodate up to twelve children without creating a nuisance to the neighbors, and has an existing swing set for use by the children. In addition, the applicants will retain the existing six foot wooden privacy fences which surrounds the [entire] play area an[d] screens the yard from direct view by their neighbors.

These features and the entire site can be seen on the Site, Landscaping and Lighting Plan

(Exhibit 4):



The subject home was recently renovated, and no further exterior changes will be made, except to add the unlighted sign depicted on the site plan, above. Technical Staff reports that the proposed sign will comply with the requirements of Zoning Ordinance §59-F-4.2(a). Exhibit 22, p.6. A permit must be obtained for the sign, and a condition has been imposed requiring Petitioners to file a copy of the permit with this office prior to posting the sign.

There will also be no changes to the existing landscaping and lighting. Tr. 56-57; 69. Exhibit 4 shows a total of 14 60-watt bulbs on the exterior, 5 of which are under the front entrance portico and 2 of which illuminate the east side entrance. The remainder are located on the side and rear of the house. Technical Staff found that the “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood.” Exhibit 22, p. 7. As described by Technical Staff, the existing landscaping on the site consists of several trees, including dogwoods, maples, crepe myrtles, pine and magnolia. Staff found that “[t]he property is well landscaped with shrubbery and flowers in both the front and rear yards.” Exhibit 22, p. 6.

There are no environmental issues because there will be no exterior changes. Exhibit 9. Environmental Planning Staff noted that the site is exempted from forest conservation laws based on the size of the site, and they recommended approval of the special exception, without condition. Attachment 11 to Exhibit 22.

C. Parking

Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site.

As is apparent from the Daycare Floor Plan (Exhibit 10) displayed on page 9 of this Opinion, the home has a single-car garage and one additional off-street space that can hold a single vehicle

without obstructing the circular drive to be used for pick-up and drop-off. Initially, Petitioners proposed to park both their cars on the street during pick-up and drop-off times so that the non-resident employees could park off the street, since Bardon Road parking is restricted to residents. However, as Petitioners' attorney explained at the hearing, DPWT permits them to use one residential guest permit to allow one non-resident employee to park his/her car on Bardon Road. Tr. 22-27. Petitioners also submitted an e-mail from Joseph Pospisil, a Program Specialist for DPWT's Division of Operations, confirming the propriety of this use of the guest parking permit. Exhibits 28 and 30.

The Hearing Examiner will impose a condition requiring that the circular drive be kept free of parked vehicles or other obstructions during pickup and drop-off periods, and that the children must be escorted to the child care entrance on the east side of the home by an adult. Another condition specifies:

Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there will be up to two non-resident staff, and Petitioners must provide one off-street parking space for one staff member during all hours of operation and must provide the other non-resident staff member with a residential guest permit issued by DPWT to allow parking on the abutting Bardon Road during all hours of operation.

Thus, during pick-up and drop-off times, neither the Petitioners nor their employees may obstruct the circular drive, and at least one off-street space must be provided for the one non-resident employee who is not given the non-resident guest pass to display in his/her vehicle. That will mean that during pick-up and drop-off times, one non-resident employee and one of Petitioners' vehicles, displaying a resident parking permit, will be parked on Bardon Road in front of Petitioners' residence, where there is room for two vehicles, as can be seen on the Site Plan (Exhibit 4).

During the rest of the operating hours, an off-street parking space must still be provided for one of the non-resident employees. The other may remain on Bardon Road with the resident guest

pass. In addition, during **non**-pick-up and drop-off times, Petitioners' second car may be parked in their circular drive or on Bardon Road, with the appropriate resident parking pass. This procedure will resolve the concern raised by the People's Counsel in his letter of February 28, 2008 (Exhibit 31) concerning parking during **non**-pick-up and drop-off times, as well as in pick-up and drop-off times.

D. Master Plan Conformance and Compatibility with the Neighborhood

The subject site is within the area covered by the Bethesda-Chevy Chase Master Plan, which was approved and adopted in April of 1990. The Master Plan reconfirms the existing zoning in the "Mid-Bethesda" area where the site is located. Master Plan, p. 51. Since the R-60 Zone permits group day care homes by special exception, it is fair to say that they are consistent with the Master Plan.

The Plan also contains guidelines regarding special exceptions (Plan pp. 31-33), which are summarized below:

1. Avoid excessive concentration of special exception and other nonresidential land uses along major highway corridors, especially office uses;
2. Avoid over-concentration of commercial service or office type special exception uses in residential communities;
3. Protect major highway corridors and residential communities from incompatible design of special exception uses and avoid front yard parking unless adequately screened to avoid a commercial appearance;
4. Support special exception uses that contribute to the housing objectives of the Master Plan, such as meeting special population needs (*e.g.* elderly housing); and
5. Support special exception uses that contribute to the service and health objectives of the Master Plan, such as child day care and elder care. In general the Plan supports child and elder day care appropriately sized to be compatible.

Section 6.22 of the Master Plan specifically addresses "Child Needs," observing that there is a "scarce supply of centers for children of ages two and under and for all-day child care centers." Plan, p. 155. The Master Plan expressly "supports the location of [child care] centers in both neighborhood/residential and employment settings" when they are compatible, and encourages the

development of small centers in residential neighborhoods. Plan, p. 155. The Master Plan specifically noted that “Recent studies of small child care centers serving 7-20 children suggest that these centers have few negative impacts, including traffic and parking, on the surrounding community.” Plan, p. 155.

As stated by Petitioners in their Statement of Compliance with the Master Plan (Exhibit 6) and by Technical Staff (Exhibit 22, p. 4), the proposed use is consistent with the Bethesda-Chevy Chase Master Plan. It is a small facility, located in a private home, which will require no exterior modifications. It will thus maintain its residential appearance and will have little or no negative impact upon the community. On the contrary, it will provide the very community benefit recommended by the Master Plan, without offending any of the guidelines enumerated above.

In sum, the proposed group day care home does not involve any changes which would negatively impact on the character and nature of the existing residential neighborhood, and the Hearing Examiner concludes that the proposed special exception is appropriately located and would be consistent with the *Master Plan*.

E. Site Access, Traffic and Safety

Vehicular access to the subject property will be from the home’s large circular driveway, which will avoid the impact of traffic on the neighborhood because it provides an off-street, vehicle-stacking location for the pick up and drop off of children using the center. The circular drive can hold up to five cars. Technical Staff expressly found (Exhibit 22, p. 5):

The large circular driveway provides safe drop-off and pick-up without any conflict with the street traffic. The site is located in a residential neighborhood with modest pedestrian activity in the vicinity of the site, and this situation will not change with the proposed use. Staff finds site access to be safe and adequate and the number of available parking spaces adequate to accommodate the proposed child daycare facility.

Transportation staff concludes that the approval of the subject special exception petition will not adversely affect the surrounding roadway system.

There being no evidence to the contrary, the Hearing Examiner accepts these findings.

The special exception must also meet the requirements of Local Area Transportation Review (LATR). Petitioners filed a “Traffic Statement” prepared by their attorney (Exhibit 19(a)), in which he calculated that the use will generate 16 trips in the morning and evening peak hours (2 for the residents, 2 for the non-resident employees, and 12 for the children using the center). This may be an inaccurate way to determine trip generation because it does not count each pick-up and drop-off as two trips, one coming in and one leaving, and because it does not account for the fact that some trips will occur outside the peak hour, though still during the peak period. However, Petitioners’ Traffic Statement appears to have been accepted by Transportation Staff at face value (Exhibit 22, Attachment 10). Nevertheless, even if we doubled the number of trips generated by the children during each peak hour (*i.e.*, 24, instead of 12), it would not reach the threshold of 30 which would require a traffic study (*i.e.*, $24 + 2 + 2 = 28$).

Moreover, the Trip generation rates in the 2004 LATR Guidelines for a child care facility with a staff of 6 (the lowest number listed) is only 28, and “For child day-care centers with staffing fewer than five persons, the traffic impact is considered to have a Deminimis impact.” *2004 LATR Guidelines, Appendix “B,” Weekday Peak-Hour Vehicle Trips Generated by Land Use for Use in Local Area Transportation Review, Table B-4.* Thus, by any measure, LATR is satisfied.

Technical Staff suggested that Petitioner would also have to comply with the 2007-2009 Growth Policy test for Policy Area Mobility Review (PAMR). Exhibit 22, p. 5. After Technical Staff had filed its report, the Council, on February 26, 2008, adopted Zoning Text Amendment (ZTA) 07-17 (Ordinance No. 16-14, effective March 17, 2008). The Hearing Examiner takes

official notice of that enactment. Under ZTA 07-17, special exceptions are required to comply with the Growth Policy in effect when the special exception application is filed. Since the application in this case was filed October 2, 2007, and the new Growth Policy did not become effective until November 15, 2007, it is the old Growth Policy which governs this special exception. PAMR was not a part of the old Growth Policy, and therefore this special exception is not required to comply with it.

If PAMR had applied, Petitioners would have been obligated to take traffic mitigation measures if their special exception produced more than 3 new trips in a peak hour. Transportation Planning Staff calculated that the special exception would increase peak-hour trips by a maximum of four,¹⁰ and that 50% of those would be “pass-by” trips by individuals using the site on their way to employment at NIH. By their analysis, this fact would reduce the number of newly generated peak-hour trips to 2, and thus avoid the need for PAMR traffic mitigation measures. For that reason, Technical Staff recommended a condition “[t]hat at least 50 percent of the children using the site must be children of employees at the National Institute of Health (NIH).”

The People’s Counsel objected to that condition because he justifiably concluded that the special exception use is for the benefit of the community in which it is located, and not for those who may not reside in that community (*i.e.*, some NIH employees). *See* Exhibit 31. Based on this objection, the Planning Board changed the recommended condition to, “The child care facility shall produce no more than 3 additional trips.” Exhibit 26. While that reformulation would avoid the problem highlighted by the People’s Counsel, it would be difficult for the Department of Permitting Services to enforce.

¹⁰ The Hearing Examiner is not sure how Transportation Staff concluded that only 4 new peak-hour trips would be generated, given the fact that two new staff members would be arriving, in addition to the 4 new children, that some of the trips might be outside the peak hour and that the children’s pick-up and drop-off trips each have to be counted twice (*i.e.*, once for arrival or their car and once for its departure). Nevertheless, this issue is eliminated for the reasons stated in the main text, above.

In any event, the fact that PAMR does not apply to this case eliminates the problem. Since Petitioners are not required to take traffic mitigation measures under PAMR, there is no reason to impose either Technical Staff's proposed "50% NIH" condition or the Planning Board's "no more than 3 additional trips" condition, both of which were intended to insure compliance with PAMR.

Based on all the evidence, the Hearing Examiner finds that the proposed use provides safe access to the proposed Day Care facility, satisfies LATR, is not subject to PAMR and will not create a nuisance because of traffic.

F. Community Reaction

There was no opposition to the proposed day care center. On the contrary, the Overlook Homeowners Association sent an e-mail indicating that it "will not contest this application," (Exhibit 24), and letters of support were received from four current and potential users of Petitioner's child care facility (Exhibits 21(b) and 27(a), (b) and (c)).

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibits 22).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “group day care home” use. Characteristics of the proposed “La Pappillon Day Care” facility that are consistent with the “necessarily associated” characteristics of group day care home uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with group day care home uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property

and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a group day care home (Exhibit 22, p. 7): (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting. To this list, the Hearing Examiner would add two more items, (6) a dwelling in which most of the services are provided; and (7) parking for the staff. Since group day care homes vary only slightly in the number of children permitted (*i.e.*, from 9 to 12), and staff is limited to no more than 3 non-resident staff members by Zoning Ordinance §59-A-2.1, there is not a great variety in the scale of group day care homes.

Technical Staff did not find any non-inherent adverse effects in this case, and the Hearing Examiner agrees. The relevant characteristics of the proposed use are consistent with the inherent characteristics identified for a group day care home. The building is not of an unusual size or design, but rather is an existing one-family residence in a residential area; the outdoor play area is fenced and screened, and the number of children using it at one time would be limited; the pick-up/drop-off area is on the already existing circular drive which can accommodate five cars without queuing onto the public street; only two additional on-street spaces are needed, and they are available in front of Petitioners' home; lighting is residential in style and will not be increased for this special exception; and the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR). The Hearing Examiner concludes that the proposed special exception will have no non-inherent adverse effects and will not result in any adverse impacts upon the neighborhood, if the specified conditions are followed.

B. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The Technical Staff report, together with the Petitioners' written evidence and testimony, provide adequate evidence that the specific standards would be satisfied in this case, as outlined below.

Sec. 59-G-2.13.1. Child day care facility.

(a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site, Landscape and Lighting Plan (Exhibit 4) and Daycare Floor Plan (Exhibit 10), satisfy this requirement.

(2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

(A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required;*
or

(B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Code § 59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there are two off-street spaces (a one-car garage and a single space off the circular drive) and two resident-permitted, on-street spaces on Bardon Road in front of the residence. There are also five spaces on the circular drive which must be kept clear

during pick-up and drop-off of children. The Hearing Examiner finds the parking to be sufficient because there will be a maximum of two non-resident staff, and conditions will require Petitioners to provide one off-street parking space for one staff member during all hours of operation and to provide the other non-resident staff member with a residential guest permit issued by DPWT to allow parking on the abutting Bardon Road during all hours of operation. Moreover, a condition requires that the circular drive be kept free of parked vehicles or other obstructions during pickup and drop-off periods, and that children be escorted to the child care entrance on the east side of the home by an adult. With these conditions, the Hearing Examiner concludes that the two off-street spaces and two on-street spaces on Bardon Road will be sufficient.

(3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As stated by Technical Staff, “The large circular driveway provides safe drop-off and pick-up without any conflict with the street traffic. . . . Staff finds site access to be safe and adequate and the number of available parking spaces adequate to accommodate the proposed child daycare facility.” The Hearing Examiner so finds.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavits have been submitted (Exhibits 32(a) and 33(a)).

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: As discussed in Part II of this Opinion and Decision, the evidence demonstrates that the proposed use would be compatible with surrounding uses and would not result in a nuisance because of traffic or parking. As to noise and physical activity, it should be noted that the children will all be preschoolers, and most will be under two and a half years of age. There will therefore not be a great deal of noisy, outdoor activity. Moreover, the back yard is fenced and landscaped, so any noise would be mitigated, and the Hearing Examiner has included a condition prohibiting any amplified sound in the back yard. Operations are limited to normal work hours, and the facility will not operate in the evenings or on weekends, so the impact on the neighborhood is reduced. Technical Staff found that, “with the recommended conditions, the use will be compatible with surrounding uses and will not result in nuisances due to traffic, parking, noise or any type of physical activity.” The Hearing Examiner agrees.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The Technical Staff report, the exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A group day care home use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. B, above.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is within the area covered by the Bethesda-Chevy Chase Master Plan, which was approved and adopted in April of 1990. The Master Plan reconfirms the existing zoning in the "Mid-Bethesda" area where the site is located. Master Plan, p. 51. Since the R-60 Zone permits group day care homes by special exception, it is fair to say that they are consistent with the Master Plan.

The Plan also contains guidelines regarding special exceptions (Plan pp. 31-33), which, *inter alia*, support special exceptions for child day care facilities. Section 6.22 of the Master Plan specifically addresses “Child Needs,” observing that there is a “scarce supply of centers for children of ages two and under and for all-day child care centers.” Plan, p. 155. The Master Plan expressly “supports the location of [child care] centers in both neighborhood/residential and employment settings” when they are compatible, and encourages the development of small centers in residential neighborhoods. Plan, p. 155. As stated by Technical Staff (Exhibit 22, p. 4), the proposed use is consistent with the Bethesda-Chevy Chase Master Plan. It is a small facility, located in a private home, which will require no exterior modifications. It will thus maintain its residential appearance and will have little or no negative impact upon the community. On the contrary, it will provide the very community benefit recommended by the Master Plan, without offending any of the Master Plan’s guidelines.

In sum, the proposed group day care home does not involve any changes which would negatively impact on the character and nature of the existing residential neighborhood, and the Hearing Examiner concludes that the proposed special exception is appropriately located and would be consistent with the Master Plan.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure. The rear yard play area

is completely fenced in and well screened by landscaping. The parking is adequate, and the circular drive can easily handle the pick-up and drop-off of children without cars backing into the street. There are no other group day care homes in the general neighborhood, so there is clearly not an excess of similar uses. On the contrary, the evidence is that there is a great need for child day care in the area. Exhibits 21(a), (b) and (c).

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have almost no physical impact on the nearest residences. On the positive end, it will provide a service needed by the neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception, as conditioned, will cause no objectionable noise or physical activity at the subject site. Technical Staff found that “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood. No new lighting will be added,” and operations cease at 5:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff did not report any other special exceptions in the neighborhood, but a number are noted on the Zoning Map (Exhibit 5). According to Board of Appeals records, of which the Hearing Examiner takes official notice, these include a medical clinic and nursing home (BA 1518, 2630, and 2823), two optometrist's offices (BA 2079 and 2153) and a philanthropic institution (BA 2640). These are all located along Cedar Lane, which is a major connecting roadway between Old Georgetown Road and Rockville Pike, and the Hearing Examiner finds that the group day care home proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the applicable Master Plan, and therefore, under the terms of this criterion, will not alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will provide a needed service to the public.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that the site “will continue to be adequately served by public facilities.” Exhibit 22, p. 10. There is no contrary evidence, and the Hearing Examiner so finds.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review,¹¹ as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review (“LATR”). Technical Staff did do such a review and determined that the LATR was satisfied. Exhibit 22, pp. 4-5. For the reasons set forth in Part II. E. of this Opinion and Decision, the Hearing Examiner agrees with their conclusions.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

¹¹ The Policy Area Transportation Review (“PATR”) was eliminated in the 2003-05 Policy Element of the Annual Growth Policy. As mentioned in Part II.E. of this Opinion, Policy Area Mobility Review (PAMR) does not apply to this case because the application was filed prior to the effective date of the 2007-2009 Growth Policy.

Conclusion: Technical Staff found that the special exception “will not reduce the safety of vehicular or pedestrian traffic.” Exhibit 22, p. 10. For the reasons set forth in Part II. E. of this Opinion and Decision, the evidence of record supports that finding, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

D. Additional Applicable Standards

59-G § 1.23. General development standards

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The proposed use meets the development standards of the R-60 Zone, as shown in the following Chart from Page 6 of the Technical Staff report:

Development Standard	Required	Proposed/Existing
Minimum Lot Area	6,000	9,655
Minimum Lot width: <ul style="list-style-type: none"> ▪ at front building line ▪ at street line 	60 ft. 25 ft	72.5 ft. 72.5 ft.
Minimum Building Setback: Front Yards Side Yards <ul style="list-style-type: none"> ▪ One side ▪ Sum of both sides Rear Yard	25 ft 8 ft 18 ft 20 ft	25 ft. 8 ft. 34 ft. Approx. 20 ft
Maximum Building Height	2 ½ stories or 35 ft	Approx. 25 ft.
Maximum Building Coverage	30%	18% Approx.

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. The use may employ up to two non-resident staff. As noted in Part II. C. of this Opinion, Petitioners will provide an off-street parking space to one of those employees and will provide a residential guest permit to allow the other non-resident employee to park his/her car on Bardon Road. Tr. 22-27. The Hearing Examiner finds that there is sufficient parking to meet the code requirements and to insure safety.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
 - (6) *Riding stables.*
 - (7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation

regulations (Exhibits 9 and 22, Attachment 11). No trees will be removed.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner proposes an unlighted sign measuring 2 square feet. A condition has been imposed which provides that Petitioners may display one unlighted sign of up to two square feet as depicted on the Site, Landscape and Lighting Plan (Exhibit 4), if it is approved by the Department of Permitting Services and a permit is obtained. A copy of the permit must be filed with OZAH before the sign is posted.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

- (h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that “[e]xisting lighting on the property is adequate and consistent with the residential character of the neighborhood. No new lighting will be added,” and operations cease at 5:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the group day care home use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 08-1 for a special exception in the R-60 Zone to operate a group day care home for up to 12 children in an existing single-family detached home, at 9201 Bardon Road, Bethesda, Maryland, is **GRANTED** subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the representations of counsel identified in this Opinion and Decision.
2. Petitioners must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a group day care home.
3. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioners shall be bound by the Affidavits of Compliance submitted in connection with this case, Exhibits 32(a) and 33(a),

in which Petitioners Shanti and Sona Vaidya certified that they will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.

4. The number of children enrolled at the center shall not exceed 12 children; nor shall it exceed the number of children authorized by State licensing authorities. The children's ages shall generally range from infant to two and a half years of age, but may be up to five years of age.
5. Hours of operation shall be limited to 7:30 a.m. to 5:30 p.m., Monday through Friday, with children arriving no earlier than 7:30 a.m. and departing no later than 5:30 p.m.
6. The arrival and pick-up times for the children shall be staggered between 7:30 a.m. and 9:00 a.m. during the morning drop-off and between 4:30 p.m. to 5:30 p.m. in the evening. In no event may a child be dropped off before Petitioners or a staff member are present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up. The circular drive must be free of parked vehicles or other obstructions during pickup and drop-of periods, and children must be escorted to the child care entrance on the east side of the home by an adult.
7. The Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
8. All children must be under the direct supervision of a staff member at all times, both inside and outside the building.
9. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.

10. Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there will be up to two non-resident staff, and Petitioners must provide one off-street parking space for one staff member during all hours of operation and must provide the other non-resident staff member with a residential guest permit issued by DPWT to allow parking on the abutting Bardon Road during all hours of operation.
11. Petitioners must provide all the fencing and landscaping depicted on the Site, Landscape and Lighting Plan (Exhibit 4).
12. Petitioners may display one unlighted sign of up to two square feet as depicted on the Site, Landscape and Lighting Plan (Exhibit 4), if it is approved by the Department of Permitting Services and a permit is obtained. A copy of the permit should be filed with OZAH before the sign is posted.
13. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: March 19, 2008

Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: All Parties of Record